

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2008/CLE/gen/FP084

IN THE MATTER of the Agreements made between (1) DARNELL INDUSTRIES LIMITED and (2) CRAIG FENNER for the sale of Apartment Unit Sites A2005, A2006, and A2007 Port of Call Villas Condominium, Phase II, Port of Call Drive, situate on Lots Number Eleven (11), Twelve (12), thirteen (13), Block Three (3), Bahama Terrace Yacht & Country Club Subdivision, Section One (1) Freeport, Grand Bahama.

AND IN THE MATTER of the Conveyancing and Law of Property Act, Chap. 138.

BETWEEN

CRAIG FENNER
Plaintiff

AND

DARNELL INDUSTRIES LIMITED
Defendant

BEFORE: The Honourable Mrs. Justice Estelle G. Gray Evans

APPEARANCES Mr Maurice O. Glington and Mr R. Rawle Maynard
for the plaintiff

Mr Harvey O. Tynes, Q.C., and Miss Ntshonda Tynes
for the defendant

2008: 5 June; 2 and 21 October;
2010: October 25;
2011: 21 March

RULING

Evans, J.

1. This is an application by the plaintiff, Craig Fenner, against the defendant, Darnell Industries Limited, for summary judgment for a claim for specific performance.
2. The action commenced by a generally indorsed writ of summons on 25 April 2008 whereby the plaintiff claims:

Specific performance of an agreement for the sale by the defendant to the plaintiff of all those apartment Unit Sites A2005, A2006, A2007 Port of Call Villas Condominium, Phase II, situate on Lots number eleven, twelve and thirteen Port of Call Drive, Block 3, Bahama Terrace Yacht and Country Club Subdivision, Section One Freeport, Grand Bahama; for an order that the defendant do all such acts and execute all such documents as may be necessary to transfer to the plaintiff all those apartment Unit Sites A2005, A2006 and A2007 Port of Call Villas Condominium Phase II, situate on Lots number eleven, twelve and thirteen Port of Call Drive, Block 3, Bahama Terrace Yacht and Country Club Subdivision, Section One Freeport Grand Bahama.

3. An appearance was entered on behalf of the defendant on 7 May 2008 followed immediately by the plaintiff's summons on 8 May 2008 in which the plaintiff states that this application is made under section 4 of the Conveyancing and Law of Property Act, chapter 138 and seeks an order pursuant to Order 75 of the Rules of the Supreme (RSC) for the following relief:
 - (1) Specific performance of an agreement made between the parties hereto as in the Writ in this action mentioned in the terms of the Minutes hereunto annexed, or alternatively,
 - (2) Directions as to the pleadings in and further conduct of this Action.
4. The plaintiff's application was originally supported by the affidavit of Stacy Bradley filed on 2 June 2008. However, counsel for the defendant objected to the use of that affidavit on the ground that it contravened Order 75 RSC. Leave was granted to the plaintiff to file a new affidavit, which the plaintiff did on 11 November 2008.
5. No affidavit in response or opposition to the plaintiff's application was filed by or on behalf of the defendant.
6. In his said affidavit, the plaintiff avers as follows:
 - (1) Around late 2000 the defendant Darnell Industries, Limited ("Darnell") agreed to sell me and I agreed to purchase two condominium apartment units described as Site Unit A-2006 and Site Unit A-2007 which it was to construct within a development named Port of Call Villa Condominium; and in about July 2001 Darnell agreed to sell me and I agreed to purchase another condominium apartment unit in the said development described as Site Unit A-2005.

- (2) The purchase prices for Site Unit A-2006 and Site Unit A-2007 and for Site Unit A-2005 were as follows:

Site Unit	Price	Deposit	Date paid	Balance Owed
A-2005	\$395,000	\$25,000	17/07/2001	\$370,000
		\$12,500	15/01/2002	\$357,500
A-2006	\$285,000	\$25,000	15/11/2000	\$260,000
		\$10,000	18/01/2001	\$250,000
A-2007	\$285,000	\$25,000	15/11/2000	\$260,000
		\$10,000	18/01/2001	\$250,000

- (3) In a related transaction, I also agreed on about 1st April 2002 to purchase from Darnell a condominium Garage at the purchase price of \$55,000. Beginning 1st April 2002 and thereafter on the 1st day of May, June, July, and August, 2002 I remitted in payment to Darnell pursuant to the terms of the said agreement, \$2,500, \$2,500, \$2,500, \$4000 and \$3,500 for a total payment of \$15,000.00, thus leaving a balance of \$40,000.

- (4) Clause 4 of each of the said Agreements provided as follows:

"The deed of conveyance... shall be held by the Vendor until completion of construction of the condominium unit to be constructed on the said unit site, but shall be dated the date of this Agreement. The said unit sites shall be conveyed to Purchaser by Deed of Conveyance, conveying good and marketable title subject to existing covenants, restrictions, reservations of Record, and subject to a Declaration of Condominium and Consolidation Agreement hereinbefore provided for by this agreement."

- (5) The Declaration of Condominium in respect of the properties in question, dated 16th day of May, A.D., 2003, was lodged for record on 5th day of August, A.D., 2003. As it was explained to me by my Attorney Maurice Glinton that the significance of the date when the Declaration was lodged for recording was notwithstanding Clause 4 of the said Agreements any Deed of Conveyance if it is to effectively convey good and marketable title to the condominium properties in question, would have to be dated on or after the date of the lodging of the Declaration of Condominium. Hence the reason for the undated state of the said Agreements.

- (6) Beginning in February 2002 and ending in February 2003, I made monthly interest payments in the amount of \$3,277.08 in respect of the

outstanding balance owed on Site Unit A-2005 totaling \$42,602.04, and \$2,291.67 in respect of the balances owed on Site Unit A-2006 and Site Unit A-2006 [sic], respectively, totaling \$29,791.71 on each one.

- (7) Under each of the said Agreements, during the period of construction of the condominium apartment Units to be constructed on the Site Units, I was to make monthly installments representing interest on the balance of the purchase price of Darnell which had agreed to take a mortgage over each Unit for the amount, namely, \$375,500 owed on Site Unit A-2005, \$250,000 owed on Site Unit A-2006, and \$250,000 on Site Unit A-2007.
- (8) Following completion of construction of the condominium units, Darnell failed and/or refused to deliver the requisite Certificates of Occupation as well as the Conveyances as called for under the said Agreements, despite my repeated requests for the same.
- (9) On 14th November 2003 Darnell served upon me a Notice to complete in respect of Unit Sites A-2005, A-2006, and Garage A-1; however by letter dated 24th February 2004 and addressed to my then attorneys Graham, Thompson & Co. Darnell revoked the said Notice and declared it null and void. It also thereby offered to sell Site Unit A-2005 to me for \$350,000 with me being responsible for all Stamp Duty on the Conveyance.
- (10) I have demanded my Conveyances and said Certificates of Occupancy in respect of each Site Unit from Darnell which it was obligated under each of the said Agreements to execute and provide but refused to do, and when it was evident that Darnell, in breach of the said Agreements, was ignoring its attorneys' requests to execute the said Conveyances they had prepared and also refusing to produce the said Certificates, I sought legal advice on the bringing of proceedings to remedy the said breaches.
- (11) As seen from the copy of a letter to me from Callenders & Co. dated 26th September 2003 Darnell and I reached an agreement whereby I would acquire Site Unit A-2005, and the purchase of the other Site Units was cancelled. Darnell instructed its said Attorneys to prepare an Agreement to Deed in respect of Site Unit A-2005 a draft of which was forwarded to me to peruse and comment on. I had by then had possession of the constructed Unit Sites having made the payments in accordance with the said Agreements.
- (12) Following a request from my said Attorney, Callenders & Co. forwarded under cover of letter dated 7th July 2004 the Conveyances for each of the Unit Sites which I in turn executed.
- (13) By letter dated 14th September 2004 my Attorney returned to Darnell's Attorneys the Conveyances I executed in escrow with a request that they be executed by Darnell and then returned for stamping and recording. In a letter dated 25th May 2005 Callenders & Co. explained why the said documents were returned without Darnell having executed them.

- (14) All tallied, I paid Darnell the sum of \$248,731.77 representing deposits on the three Site Units (\$107,500.00), interest payments for the thirteen month period (\$102,185.46), payment for a Garage (\$15,000.00), condominium fees for the months July and August, 2003 (\$2,070), and attorneys fees and Stamp Duties in respect of the several transactions (\$21,976.31). Even though I have made such payments, I have to date yet to be given the Conveyances or the said Certificates in respect of the constructed Site Units; nor have I been provided with an Agreement of purchase and sale for Site Unit A-2005 or an Agreement of purchase and Sale for the Garage.
- (15) I verily believe that Darnell not only acted unreasonably but wrongfully in repudiating the said Agreements in the manner aforesaid; furthermore, based on the advice of my Attorney, I verily believe that upon a consideration of all of the facts relevant to this action for specific performance there is no defence thereto.
- (16) In the premises I respectively request that this Honourable Court accede to my application for Summary Judgment pursuant to the Summons filed herein on 8th May 2008, subject to such terms and conditions as to the court seems just.

7. Exhibited to the plaintiff's affidavit are copies of documents, unexecuted as well as partially executed; copies of cancelled cheques and receipts; billing statements; notice to complete and letters passing between the parties and/or their attorneys, referred to in the said affidavit.

8. A few days before the date set for the hearing of the plaintiff's application my clerk alerted me that counsel for the plaintiff, Mr Ginton, was asking for the matter to be adjourned because of a conflicting fixture. I directed my clerk to ask Mr Ginton to notify counsel for the defendant of his intention to seek an adjournment and to have them agree a new date for the hearing of the plaintiff's summons. On the Friday afternoon prior to the Monday scheduled hearing date, I received counsel for the defendant's written submissions, but up to the time of the hearing I had not received any such submissions from the plaintiff or his counsel.

9. In light of the above I had, on the morning of the hearing, anticipated that Mr Maynard, who was holding brief for counsel for the plaintiff, was there merely to seek an adjournment.

10. However, instead of asking for an adjournment, Mr Maynard submitted that summary judgment be entered for the plaintiff on the ground that the plaintiff's claim was not opposed.

11. In that regard, Mr Maynard pointed out firstly, that the only objection to the plaintiff's claim which the defendant had voiced previously was with respect to the first affidavit in support of the application, which objection, he says, had been answered with the plaintiff's said affidavit; and secondly, the defendant had not filed an affidavit in reply.

12. Further, Mr Maynard indicated that he had only just received the defendant's skeleton arguments on the morning of the hearing and although he had not yet read them, he "suspected" that the defendant intended to satisfy the Court "otherwise" than by affidavit that there was a defence or some issue to be tried.

13. Mr Tynes, Q.C., in response pointed out that, although it was the plaintiff's application, he had not yet (nor indeed has this Court) seen any written submissions from the plaintiff or his counsel.

14. Nevertheless, I called upon Mr Tynes, Q.C., to respond to the plaintiff's application.

15. Although the defendant did not file an affidavit, counsel for the defendant nevertheless argues that the plaintiff has not made out a cause of action to which the defendant can have no possible defence. He seeks to show this by pointing out the defects and/or inconsistencies in the plaintiff's pleadings and evidence.

16. In that regard, Mr Tynes, QC, makes the following observations and/or submissions, which he says, militate against the plaintiff being granted the relief he seeks:

- (1) There is no evidence before the Court that there is an agreement between the plaintiff and the defendant which may be enforced either specifically or otherwise.
- (2) To date, the plaintiff has not filed a statement of claim setting out the material facts on which the plaintiff relies in support of his claim.
- (3) There is no evidence before the Court of an agreement in writing relating to Site Unit A-2005 or Site Unit A-2007 to satisfy the provisions of Section 4 of the Statute of Frauds, chapter 154 Statute Laws of The Bahamas.
- (4) The defendant does not contend and has adduced no evidence to show that he ever complied with the requirements of the notice to complete dated the 14th November, 2003.

17. Consequently, counsel for the defendant submits, the plaintiff's application for an order pursuant to the provisions of Order 75 rule 1 RSC should be dismissed.

18. In response, Mr Maynard argues that the plaintiff's affidavit sets out the factual evidence as to what transpired between the parties. He submits that there are agreements in writing and other evidence which would satisfy the Statute of Frauds; that where there are not specific agreements, there is ample evidence in writing to evidence an agreement.

19. Mr Maynard submits further that the only reason the order for specific performance should not be made is if there is a triable issue and in his submission, counsel for the defendant has raised no such issue - of fact or law - to which this Court should pay heed. He submits, therefore, that it is clear that the defendant has no defence to the plaintiff's claim.

20. The principles governing applications for summary judgment are not disputed.

21. Order 75 RSC (which are materially identical to Order 86 of the English Rules) provide, inter alia, that:

- (1) In any action begun by writ indorsed with a claim...for specific performance of an agreement (whether in writing or not) for the sale,

purchase or exchange of any property...the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment. (rule 1)

- (2) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason be a trial of the action, the Court may give judgment for the plaintiff in the action. (rule 3).
- (3) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court. (rule 4(1))

22. Order 75 is in similar terms to Order 14 RSC and reference should be made to the notes at 14/3-4/1 onwards as to the general principles on which judgment will be given for the plaintiff or leave given to the defendant to defend. (1997 Edition of the English Supreme Court Practice, paragraph 86/4/1).

23. In summary, the purpose of Order 75 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. (See *Roberts v Plant* [1895] 1 Q.B.D. 597; 1997 Edition of the English Supreme Court Practice, paragraph 14/3-4/2).

24. As indicated, the only evidence before me is that tendered by the plaintiff. As there is no evidence from the defendant refuting the plaintiff's claims, it should have been a simple matter for the plaintiff to be given judgment, particularly in view of Mr Maynard's submissions that the defendant has raised no issue of law or fact to which this Court should give heed and further, and consequently, the defendant has raised no triable issue.

25. However, having read the plaintiff's affidavit and all of the documents exhibited thereto, I agree with counsel for the defendant that the plaintiff has failed to make out a case for summary judgment.

26. The plaintiff alleges that he has "an agreement" to purchase site units A2005, A2006 and A2007 aforesaid. Presumably as evidence of that agreement, the plaintiff exhibits copies of cheques and receipts representing deposit payments as shown at paragraph 3 of his affidavit. He also avers that, in addition to the aforesaid deposits, he had, at the date of his affidavit, also made interest payments on the balance purchase prices for a combined total of \$248,731.00 having been paid to the defendant with respect to the aforesaid agreement.

27. Further, although the plaintiff avers that the agreement to purchase the three units was made in 2000 and 2001, he only exhibits a signed but undated agreement with respect to A2006. There is no indication in the affidavit or otherwise that there were any such documents with respect to A2005 and A2007.

28. Mr Tynes, QC, says that by failing to produce such agreements the plaintiff has produced no evidence of an agreement in writing that will satisfy section 4 of the Statute of Fraud, chapter 154, Statute Laws of The Bahamas, which requires for the sale of land to be evidenced in writing. Mr Maynard disagrees. In my view, however, that is an issue that ought to be tried and cannot be resolved on what is presently before the Court.

29. In any event, even assuming that Mr Maynard is correct and the documentary evidence is sufficient to satisfy section 4 of the Statute of Frauds aforesaid with respect to unit A2005 and A2007, according to a letter dated 26 September 2003 from Callenders & Co. to the plaintiff, exhibited to the plaintiff's affidavit, Callenders wrote, inter alia:

"I have been advised by Stephen Mellor to prepare an agreement to deed in respect of your purchase of Unit A2005 and that an agreement has been arrived at to cancel the purchase of Units A2006 and A2007." And

"Accordingly, the fact that all of these transactions were not completed was not due to my not performing the services for which I was retained, but due to a new arrangement being arrived at between the vendor and yourself...."

30. There is no evidence that the plaintiff responded to that letter indicating that the information was incorrect or that he had not arrived at such an agreement. Indeed, the plaintiff at paragraph 15 of his affidavit confirms that that was, in fact, the position as he avers:

"Darnell and I reached an agreement whereby I would acquire Site Unit A-2005, and the purchase of the other sites was cancelled."

31. Notwithstanding the plaintiff's averment at paragraph 15 aforesaid and the contents of the aforesaid letter dated 26 September 2003, on 14 November 2003, the defendant, again according to the plaintiff's evidence, served the plaintiff with notice to complete in respect of units A2005 and A2006. No mention was made of unit A2007 in that notice, which was also exhibited to the affidavit, and, as pointed out by counsel for the defendant, the plaintiff does not contend and has adduced no evidence to show that he ever complied with the requirements of the notice to complete or that the notice was invalid.

32. The plaintiff at paragraph 13 of his affidavit says that the defendant revoked that notice and also declared it null and void. In support of that averment, he exhibits a copy of a letter dated 24 February 2004 from the defendant to the plaintiff's then attorneys, Graham, Thompson & Co., in which the defendant wrote, inter alia:

"Pursuant to our telephone conversation today, I hereby state that Darnell Industries Limited position is that the Notice to Complete served on Craig Fenner on November 14th, 2003 negates all past transactions, and are considered by Darnell as Null and Void."

33. It appears to me that it is "all past transactions" which are considered "null and void" and not the notice to complete. That interpretation is, in my view, borne out by the fact that the plaintiff avers that in that same letter the defendant offered to sell unit A-2005 to him for \$350,000.00, which suggests to me that the defendant considered the previous agreements to be at an end and was making a new offer to sell unit A-2005. That offer was to have been accepted within seven days. There is no evidence that that offer was accepted, although there is an unsigned and undated copy of an agreement for purchase and sale with respect to unit A2005 at a consideration of \$350,000.00 exhibited to the plaintiff's affidavit, and the plaintiff does aver that he and the defendant had a new agreement.

34. Consequently, in my view, there is an issue as to whether it was the notice that was declared null and void or the "agreements" with respect to the sale and purchase of units A2006 and unit A2007 and if so, whether there was a new agreement to purchase unit A2005.

35. Finally, at paragraph 18 of his affidavit, the plaintiff avers that he has "yet to be given the conveyance or the certificates in respect of the construction site units"; nor has he "been provided with an agreement of purchase and sale for site unit A2005..."

36. If, as it appears from the plaintiff's evidence, the original transactions with respect to all of the units had been cancelled and a new agreement made with respect to his purchase of unit A2005, by his own admission, the plaintiff has not been provided with a written agreement, although attached to his affidavit is an undated and unsigned copy of an agreement with respect to unit A2005. However, the issue again arises as to whether the "evidence" of this new agreement satisfies the requirements of section 4 of the Statute of Frauds aforesaid.

37. One of the conditions to a plaintiff obtaining summary judgment without a trial is that he must be able to prove his claim clearly. It is only then that the Court, in my view, has to consider the other conditions, for example, whether the defendant is able to set up a bona fide defence or raise an issue against the claim which ought to be tried. *Roberts v Plant* (1895) 1 QB 597 (14/3-4/2).

38. So, notwithstanding Mr Maynard's submission that the defendant ought to have either filed an affidavit or call a witness to refute the facts alleged by the plaintiff, it is accepted that the rules do provide for a defendant to show cause against an application for summary judgment by "affidavit or otherwise" to the satisfaction of the Court. In that regard, counsel for the defendant, has, in my view, shown that there are sufficient issues raised on the plaintiff's evidence to persuade me that this is not a proper case for summary judgment.

39. In the end, the plaintiff seeks "specific performance of an agreement for the sale by the defendant to the plaintiff of unit sites A2005, A2006, A2007", and in my judgment he has failed to prove that there is in fact such an agreement. Further, in light of the plaintiff's averment at paragraph 15 of his affidavit, that a new agreement was arrived at whereby he was to purchase unit A2005 and the agreement with respect to units A2006 and A2007 were cancelled, I do not see how the plaintiff, on what is presently before this Court, can call for specific performance of an agreement relating to all of the units.

40. In my judgment, the plaintiff has failed to prove his claim clearly so as to entitle him to an order for specific performance and I, therefore, dismiss his summons for summary judgment.

41. The plaintiff should now serve a statement of claim and the matter proceed in the normal course.

42. Costs will be in the cause.

Delivered this 21st day of March 2011

Estelle G. Gray Evans
Justice

